No. 76-179

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIS A. MARKERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 34-36) is reported at 537 F. 2d 957. The opinion of the panel (Pet. App. 11-33) is reported at 528 F. 2d 773. The opinion of the district court (Pet. App. 1-10) is not reported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on July 9, 1976. The petition for a writ of certiorari was filed on August 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the speech and debate provisions of the Illinois State Constitution create a testimonial privilege

for a state legislator in a federal criminal investigation, and, if so, whether petitioner waived his privilege in the circumstances of this case.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Speech or Debate Clause of the United States Constitution, Article I, Section 6, clause 1, provides in part:

> The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The Supremacy Clause of the United States Constitution, Article 6, Section 2, provides:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Speech or Debate Clause of the Illinois Constitution, Article IV, Section 12, provides in part:

> Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of of the General Assembly. A member shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. * * *

Fed. R. Evid. 501 provides in part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. * * *

STATEMENT

1. In 1973 a grand jury empaneled in the Northern District of Illinois was investigating alleged corruption in the Illinois General Assembly. Petitioner, a member of the Assembly, consented to be interviewed by federal postal inspectors and an Assistant United States Attorney; in addition, he testified before the grand jury. He did not invoke any privilege arising under either the federal or state constitutions.

In December 1974 petitioner, Robert Craig, and Thomas J. Hanahan were indicted for extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and for mail fraud, in violation of 18 U.S.C. 1341. Both crimes occurred while they were members of the state legislature. The indictment charged the three defendants with extorting $1,500 from members of the Illinois Car and Truck Renting and Leasing Association in exchange for helping to block the passage of certain legislation, and with engaging in a scheme to defraud the citizens of the State of Illinois of their "loyal, faithful and honest services in their official positions" and "their right to have the legislative business of the State of Illinois conducted honestly."

In February 1975 petitioner moved to suppress his grand jury testimony and the statements given to the Assistant United States Attorney and the federal postal inspectors. He claimed that these statements had been obtained from him in violation of both the federal and state Speech or Debate Clauses. The United States District Court for the Northern District of Illinois ruled that petitioner was entitled to the protection of the Speech or Debate Clause contained in Article IV, Section 12, of the Illinois Constitution. Concluding that a state legislator could not waive the privilege accorded by the Speech or Debate Clause of the state constitution, the district court suppressed petitioner's statements to both the Assistant United States Attorney and the federal postal inspectors, as well as his testimony before the grand jury.

The government appealed the suppression order.[1] A panel of the court of appeals concluded that federal common law creates a testimonial privilege for statements of state legislators. The court held, however, that petitioner had waived this privilege by voluntarily giving statements to the grand jury and the federal officials. It therefore reversed the suppression order.

Judge Tone concurred in the result. He argued that only the doctrine of "official immunity" might protect state legislators from liability under federal law, that this immunity does not apply to criminal cases, and that where there is no common law official immunity there should be no evidentiary privilege (Pet. App. 27-33).

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[1]The district court denied petitioner's motion to dismiss the indictment. Accordingly, the only issue before the court of appeals concerned the scope of any testimonial privilege petitioner may have. See Pet. App. 36.

Both petitioner and the government filed petitions for rehearing with suggestions of rehearing *en banc*. The court of appeals granted the government's petition but denied petitioner's.[2] Five members of the court *en banc* agreed with the views of Judge Tone and voted to reverse the suppression order for that reason (Pet. App. 35). One judge supported the position of the panel (*ibid.*), one judge believed that the "constitutional relationship between the states and the United States requires federal courts to recognize and honor the Speech or Debate Clause of the Illinois Constitution, but would hold that the privilege was waived for the reasons stated by the panel majority" (*id.* at 36), and one judge "agree[d] with the panel majority as to the existence of the privilege * * * but would affirm because he believe[d] the privilege was not waived" (*ibid.*). The suppression order therefore was reversed by a vote of seven to one.

ARGUMENT

1. The abstract arguments advanced by petitioner, touching on the appropriate accommodation of federal and state power, relate to an issue not squarely presented by this case. Petitioner is seeking the suppression of certain statements he voluntarily made to federal officials and before a grand jury. By voluntarily making these statements, petitioner waived whatever testimonial privilege he may otherwise have had. As the Court held in *Garner* v. *United States*, 424 U.S. 648, a testimonial privilege must be asserted at the time of testimony; except in extraordinary circumstances, a witness who voluntarily makes statements without asserting a privilege cannot later seek to have the statements suppressed as evidence in a federal criminal prosecution.

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[2]Petitioner immediately filed a petition for a writ of certiorari, which was denied on May 19, 1976 (No. 75-1225).

Petitioner asserts that the privilege may not be waived. This argument is incorrect. Although a "speech or debate" privilege exists for the benefit of the legislative process as well as for the benefit of individual legislators, this Court has indicated that the federal privilege may be waived. *Gravel* v. *United States*, 408 U.S. 606, 622 n. 13. Moreover, petitioner has a right under the Due Process Clause to testify at trial about his legislative speeches and the motivation for his legislative deeds (see *Washington* v. *Texas*, 388 U.S. 14, 19); the fact that petitioner may proffer such testimony demonstrates that he may waive his privilege. He could waive it as easily by giving a public address concerning his deeds as a legislator; this address could be introduced in evidence. Testimony before a grand jury, and statements to federal officials, should be accorded no different treatment. We therefore submit that the court of appeals correctly decided that petitioner surrendered any testimonial privilege he may have had by voluntarily giving statements. See Pet. App. 24-27.

2. Even if the merits of petitioner's claim of privilege had been properly preserved, there would be no reason for this Court to grant review. There is no conflict among the circuits; the instant case is the first to consider the question. Moreover, the decision of the *en banc* court is correct.

The "Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States*, *supra*, 408 U.S. at 616. It was intended "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary * * *." *Id.* at 617; see also *United States* v. *Brewster*, 408 U.S. 501, 508, 517-518; *United States* v. *Johnson*,

383 U.S. 169, 181. No similar principle of respect for a coordinate branch of government pertains to federal-state relations. In fact, the Supremacy Clause of the Constitution establishes a contrary principle; federal law is supreme, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This Court has indicated that the official immunity with which state officials are endowed in civil cases does not extend to criminal cases. Legislative immunity in federal civil rights cases was recognized in *Tenney* v. *Brandhove*, 341 U.S. 367. But *Tenney* did not recognize a "speech or debate" privilege for state legislators in all federal cases; it is simply one of many examples of offical immunity in the federal common law. *United States* v. *Brewster*, *supra*, 408 U.S. at 516 n. 10; *Doe* v. *McMillan*, 412 U.S. 306, 319 n. 13. Official immunity does not erect a shield against criminal prosecutions for violations of federal laws.

For example, although judges are immune from federal civil rights liability, they are exposed to prosecution for violations of 18 U.S.C. 242. The Court wrote in *O'Shea* v. *Littleton*, 414 U.S. 488, 503, that "[w]hatever may be the case with respect to civil liability generally * * * or civil liability for willful corruption * * *, we have never held that the performance of the duties of judicial, *legislative*, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. * * * On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress' " (emphasis added; quoting from *Gravel* v. *United States*, *supra*, 408 U.S. at 627). Similarly, although prosecutors are immune from federal civil liability, that immunity—

> does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242 * * *. The prosecutor would fare no better for his willful acts. [*Imbler* v. *Pachtman*, 424 U.S. 409, 429; footnotes omitted.]

The Illinois Constitution does not apply directly to federal cases. Petitioner could ask for no more than a common law privilege grounded on considerations of comity and the need to shield legislators from harassment and vexation. Yet there is no more reason to extend such a federal privilege to state legislators than there is to extend it to state judges or state prosecutors. *Imbler* and *O'Shea* establish that state judges and prosecutors do not have immunity from prosecution for their criminal acts; state legislators should fare no better. The only arguable reason for creating a testimonial privilege would be to implement some substantive immunity from prosecution. Because there is no substantive immunity from federal criminal prosecution, no useful purpose would be served by creating a federal testimonial privilege broader in scope than the privilege against self-incrimination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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